Department of Justice

STATEMENT

OF

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BEFORE

THE

COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

CONCERNING

S. 1815: THE POLYGRAPH PROTECTION ACT OF 1985

ON

APRIL 23, 1986

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to appear on behalf of the Department of Justice at this hearing on S. 1815, the proposed "Polygraph Protection Act of 1985." This bill, if enacted, would prohibit private sector employers from administering polygraph examinations to employees or prospective employees.

The Department of Justice vigorously opposes federalizing the law in this area. Such action is directly contrary to the principles of federalism on which our union is based and to which this Administration is deeply committed. Until now, regulating polygraph use has been the responsibility of the states. In fact, thirty-five states have enacted statutes regulating the use of polygraph or other "honesty" tests or polygraph examiners. To preempt the states in this context, where there is no evidence of an overriding need for national policy uniformity, would do violence to an important underlying principle of our union -- the belief in the ability and responsibility of the states generally to govern the affairs of their citizens.

The attempt to federalize the law in this arena has implications far beyond polygraph regulation; it is symptomatic of the persistent tendency of government officials in Washington -- well meaning officials -- to act as if only we can fully understand and remedy the problems confronting 240 million Americans. It is this attitude that, in recent decades, has been

As with many things elemental, there is a tendency sometimes to give the principles of federalism short shift. I recognize that it is not always easy to identify a bright line between those responsibilities of government that ought to be carried out by the national government and those more appropriately addressed by the states. Even in this Administration, which is deeply committed to ensuring that each level of government operates in its appropriate sphere, we have sometimes had trouble drawing that line. It is important, nevertheless, that those in the executive and legislative branches not lose sight of the inherent responsibility to confront this matter.

This responsibility is particularly acute given the Supreme Court's recent decision in Garcia v. San Antonio Metropolitan Transit Authority, 105 S. Ct. 1005 (1985). In that case, the Supreme Court held, with respect to federal regulation under the commerce power, that Congress, not the federal courts, generally is the primary protector of state sovereign rights and responsibilities. As the Court observed,

> We continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the commerce clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action -- the built-in restraints that our system provides through state participation in federal governmental action.

The Framers of the Constitution set up a structure that apportions power between the national and state governments. The values that underlie this structure of federalism are not anachronistic; they are not the result of an historic accident; they are no less relevant to the United States in 1986 than they were to our Nation in 1789. In weighing whether a public function ought to be performed at the national or state level, we should consider the basic values that our federalist system seeks to ensure. Some of those principles include:

Dispersal of Power -- By apportioning and compartmentalizing power among the national and 50 state governments, the power of government generally is dispersed and thereby limited.

Accountability -- State governments, be being closer to the people, are better positioned as a general matter to act in a way that is responsive and accountable to the needs and desires of their citizens.

Participation -- Because state governments are closer to the people, there is the potential for citizens to be more directly involved in setting the direction of their affairs. This ability is likely to result in a stronger sense of community and civic virtue as the people themselves are more deeply involved in defining the role of their government.

Containment -- Experimenting with varying forms of regulation on a smaller, state scale rather than on a uniform, national scale confines the harmful effects of regulatory actions that prove more costly or detrimental than expected. Thus, while the successful exercises in state regulation are likely to be emulated by other states, the unsuccessful exercises can be avoided.

While these values of federalism may often mitigate in favor of state rather than national action, other factors -- including a demonstrated need for national policy uniformity or for a monolithic system of enforcement -- mitigate in favor of action by the national government and must be balanced in this process. For example, the need for a uniform foreign policy on the part of the United States clearly justifies national rather than state action in this area. Similarly, in the interstate commerce area, the need for a uniform competition policy argues strongly for national antitrust law; and the need for efficient flow of interstate transportation argues for national rather than state regulation of airplane and rail safety. In other words, by federalism, we are not referring to the idea of "state's rights"; rather, we are referring to the idea expressed in the Constitution that certain governmental functions are more properly carried out at the level of the fifty states, while others are more properly carried out by the national government.

There are a number of interests that must be balanced in determining whether or how to regulate polygraphs. For example, while certain employees may be concerned about the intrusiveness of polygraph regulation, other employees -- for example, employees falsely accused of stealing from their employers -- may desire the availability of polygraph tests in order to establish their innocence.

Moreover, by protecting employees from the use of polygraph tests, employers are necessarily restricted in their use of a test that may help ensure they are hiring honest or firing dishonest employees. No one can dispute the need for identifying and discharging dishonest or thieving workers. From losses reported during a recent random sampling of three industries -- retail department store chains, general hospitals, and electronic manufacturing firms -- the National Institute of Justice estimated that business and industry lose to employee theft five to ten billion dollars annually. Not only are employers losing valuable assets and paying higher prices for theft insurance policies, but, to the extent possible, employers pass on those costs in the form of higher prices to consumers. Some of the commodities diverted -- drugs, for example -- impose their own costs on society. According to the Drug Enforcement Administration, legally produced drugs, falling in the wrong hands, kill and injure twice as many people annually as illicit drugs. DEA estimates that half a million to a million doses of drugs are

for aiding them in making responsible decisions about existing or prospective employees. According to the House Committee Report on H.R. 1524, more than two million polygraph tests are administered in the private sector each year, triple the number given ten years ago. From an economic perspective, it seems highly unreasonable to believe that employers would incur the cost of $50-$60 per test and risk generating some bad will among valuable or potentially valuable employees, and perhaps losing them to competitors, if those employers did not believe the tests provided useful information. Moreover, it must be remembered that the alternatives to polygraph tests -- for example, background checks and personal interviews in the preemployment screening context -- may be far more highly subjective and may intrude upon privacy interests in at least as substantial a way. The value of polygraphs, therefore, should be analyzed not by some unattainable, ideal standard, but with reference to existing, real-world investigative alternatives. Again, these are considerations as to which different citizenries in different states may reasonably come to different conclusions.

S. 1815 itself takes an inconsistent stand on whether polygraph tests are sufficiently valid to be useful. While the bill would ban the use of polygraphs in the private sector, in large part because of the inaccuracies of the test, it explicitly recognizes the usefulness of polygraphs for the government by continuing to allow polygraph testing of all governmental employees. Certainly if the machines are reliable indicators

seeking sensitive positions involving the distribution or sale of controlled substances, they would seem to be equally useful for screening prospective employees for other sensitive positions, such as airport security personnel and truck drivers transporting munitions and other hazardous materials.

What all of this indicates is that polygraph regulation is a complex and emotional issue which poses a number of questions with no definitive answers. It is an issue which requires careful balancing of the interests of consumers, employees, and employers. Possible responses range from relying on the free market, to licensing polygraph examiners, to banning completely the use of polygraphs. While all sorts of variations on these approaches are possible, which precise approach is best for any given state should be left to the citizens of that state. We see no reason to forestall the vigorous debate on the issue continuing to take place within the states.

In fact, those states that have regulated in this field have adopted widely varying approaches. Nineteen states and the District of Columbia regulate employers' use of the polygraph; three states regulate employers' use of other "honesty testing devices." Some of these states completely ban the use of polygraphs by private employers; others prohibit employers from requiring employees to take the tests, but allow them to be administered to employees who volunteer to take them; still others exempt certain occupations -- ranging from police and

Again, however, I reiterate that merely fixing this or other more minor problems would not be sufficient to remedy the fundamental defect of this bill -- federalizing an area of law best left to the states.

I would like to conclude my remarks with a quote from President Reagan. In an address to the National Conference of State Legislatures on July 30, 1981, he stated:

> Today federalism is one check that is out of balance as the diversity of the states has given way to the uniformity of Washington. And our task is to restore the constitutional symmetry between the central government and the states and to reestablish the freedom and variety of federalism. In the process, we'll return the citizen to his rightful place in the scheme of our democracy and that place is close to his government. We must never forget it. It is not the federal government or the states who retain the power -- the people retain the power. And I hope that you'll join me in strengthening the fabric of federalism. If the federal government is more responsive to the states, the states will be more responsive to the people . . .

For the reasons so eloquently articulated by President Reagan, I urge that this bill not be enacted.